Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 84-6859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

Instead of attempting to justify the South Carolina Supreme Court's designation of a capital defendant's likely good behavior in prison as "irrelevant" to the sentencing decision, respondent has devoted its entire brief to obscuring the constitutional violation which occurred in this case.[1] Essentially, the respondent denies the existence of the rule of *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (*Koon I*), under which the trial judge excluded as irrelevant all impartial testimony tending to establish petitioner's past and likely future good conduct in confinement. Respondent then asserts that the trial judge excluded this evidence not on grounds of relevance, but only because it consisted of incompetent opinion testimony from lay witnesses. Brief of Respondent at 14.

There are three problems with this argument. First, it is contradicted by the record. Second, it ignores the South Carolina law which governed petitioner's trial. And third, even accepting respondent's factually and legally erroneous premises, the proffered testimony of petitioner's jail witnesses was competent and admissible under South Carolina evidence law, and its exclusion violated *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

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[1] Respondent has not always been so diffident with respect to the constitutional issue presented here. In its Brief in Opposition to the petition for a writ of certiorari, respondent flatly asserted that "[a] defendant's future adaptability or conformity to prison life is irrelevant," and cited as authority the South Carolina Supreme Court's decisions in *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) and *State* v. *Koon*, 285 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985). The Brief in Opposition continued:

> Petitioner advances no convincing argument or authority as to why one's continuing enjoyment of life should be contingent upon his future adaptability to prison. Regardless of whether the future adjustment is good or poor the defendant would still be alive, and the continuance of his life in light of the commission of a particular crime is the question before the jury. The jury is simply not being called upon in a capital sentencing proceeding to choose an ordinary citizen who they [sic] feel will be a well-adjusted productive prisoner.

Id. at 3. This argument, which fairly summarizes the law of South Carolina as applied by the trial judge in this case, is nowhere to be found in respondent's brief on the merits.

1. **The Record Shows That The Testimony Of Petitioner's Jail Witnesses Was Excluded Solely Because The Trial Judge Regarded The Subject Of Petitioner's Conduct In Confinement As Irrelevant, And Not Because The Proffered Testimony Was Incompetent Or Unreliable.**

Respondent claims that the trial judge excluded the testimony of petitioner's three jail witnesses only because their testimony would have constituted incompetent lay opinion evidence. In fact, the excluded evidence actually consisted primarily of firsthand observations of petitioner's record of behavior in jail up until the time of his trial. Defense counsel's proffer consisted of the following:

> MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.
>
> THE COURT: Whether he can or cannot, State versus Koon says it is not an issue in this case.
>
> MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?
>
> THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust. . . . I am telling you they will not be permitted to testify about his adjustability to prison life.

J.A. 11. This colloquy belies respondent's suggestion that the trial judge excluded these witnesses only because he believed that they were being offered to make predictions concerning petitioner's future conduct which they were incompetent to express. On the contrary, the evidence was excluded because the trial judge believed, in conformity with the holding of *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) (*Koon I*), that the entire subject of petitioner's past, present and future conduct in prison was irrelevant to the sentencing decision.[2]

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[2] Respondent's argument to the contrary may have been suggested by the fact that the proffer of petitioner's jail witnesses occurred shortly after defense counsel had attempted to elicit from petitioner's ex-wife an opinion concerning petitioner's capacity to make a good adjustment to prison. J.A.

Respondent places great emphasis on the fact that petitioner's trial counsel described the proffered testimony to the trial judge as relating both to petitioner's past good conduct and to his likely future good conduct in confinement. Brief of Respondent at 2-3, 11-12. Apparently, respondent wishes the Court to conclude from this that defense counsel intended to ask the jail witnesses no more than to express their opinions concerning petitioner's likely future conduct in prison. As noted above, the record plainly shows otherwise. Moreover, since defense counsel's purpose in proving petitioner's past good behavior in jail was obviously to permit the jury to draw the inference that his future behavior in prison would also be good, it is not surprising that counsel referred to his client's past and future good behavior in confinement as presenting one and the same issue. The phrasing of counsel's proffer is all the more understandable in view of the fact that at the time of petitioner's trial, South Carolina had not yet attempted to create any distinction between the admissibility of past and likely future good behavior in confinement. It was not until April, 1984, well after petitioner's sentencing hearing, that the South Carolina Supreme Court first made such a differentiation. In *State* v. *Koon*, 281 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985) (*Koon II*), South Carolina reaffirmed its designation of a defendant's future good conduct in prison as "irrelevant," but acknowledged for the first time the relevance of *past* good behavior in prison—albeit only as proof of a defendant's general good character. Since *Koon II*

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10. The prosecutor objected to this question on the grounds that the witness had not been qualified as an expert and thus was not competent to express an opinion. The trial judge sustained the objection, but not on the basis urged by the prosecutor: by citing *Koon I* in excluding the evidence—a case in which the South Carolina Supreme Court upheld the exclusion of expert psychiatric opinion evidence on the same issue—the judge made clear that he was excluding the opinion testimony of Mrs. Skipper on grounds of the *relevance* of the entire question of petitioner's future conduct in prison, and not because of any concern over the competence of the particular evidence then being offered. Whether the evidence could fairly have been excluded as incompetent need not be decided, since petitioner has not challenged the exclusion of Mrs. Skipper's testimony in this Court, and the correctness of this ruling is thus not at issue here.

was decided more than nine months after petitioner's trial, trial counsel could hardly have been expected to frame his proffer in terms of the artificial distinction between past and likely future behavior which *Koon II* and other later South Carolina cases would seek to create.[3]

Respondent also insists that the trial judge "admitted . . . into evidence" other testimony tending to establish petitioner's past and future adaptability to prison, Brief of Respondent at 3-4, and that evidence of his past adjustment was "ruled admissible" at one juncture in the trial. *Id.* at 11. Respondent makes these assertions in an effort to persuade the Court, despite the explicit ruling of the trial judge excluding the entire subject of petitioner's conduct in prison as irrelevant, that such evidence would nevertheless have been admitted had it merely been proffered in some different way. The truth of the matter is that all such "rulings" consist of no more than the trial judge's failure to exclude evidence *sua sponte* absent an objection by

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[3] Indeed, until *Koon II* was decided, the respondent State of South Carolina insisted that evidence of a capital defendant's past adaptability to confinment presented the same legal issue—and was equally inadmissible—as evidence of his likely future adaptability. Some nine months after petitioner's trial, respondent was still arguing in the South Carolina Supreme Court that a capital defendant's past good behavior in jail was completely irrelevant to the capital sentencing decision, and that *Koon I* mandated its exclusion just as it mandated the exclusion of expert psychiatric predictions of a defendant's likely *future* good conduct in prison. *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), Brief of Respondent at 11-12. In *Stewart*, the trial judge had excluded on the basis of *Koon I* the proffered testimony of several jail and stockade officials concerning the defendant's good behavior in pretrial confinement. The respondent's argument in *Stewart* as contained in its brief included the following assertions:

> [S]uch evidence was properly excluded. While evidence of past conduct in prison is not the same as evidence of future adaptability to prison life, the same rationale excludes both types of testimony. Neither type of testimony informs the jury of the circumstances of the crime or the characteristics of the individual defendant as they bear logical relevance to the crime. *See Koon, supra* . . . There is no "logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." [*State* v.] *Plath*, [281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 104 S.Ct. 3560 (1984)]. This reasoning applies to past as well as future adaptability.

the prosecution.[4] Since the trial judge did not make a single *sua sponte* evidentiary ruling during the course of petitioner's entire case in mitigation, Tr. 1023-1168, respondent's effort to create the impression of a considered determination of the admissibility of evidence concerning petitioner's adaptability to prison is disingenuous.

Finally, respondent has ignored South Carolina law by its argument that the admissibility of the testimony of petitioner's jail witnesses would have been treated differently by the South Carolina Supreme Court but for the manner in which trial counsel proffered the witnesses' testimony. In *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), the state court applied *Koon II* to reverse a death sentence due to the erroneous exclusion of the mitigation testimony of jail officials despite the fact that defense counsel had proffered these witnesses' testimony as bearing only on the defendant's "future adaptability to life in prison." Rejecting an argument rather similar to the one which respondent now advances in this Court, the South Carolina Supreme Court in *Stewart* agreed with the defendant that the trial judge "should have realized that the lay testimony [of the jailers] would necessarily have included appellant's past behavior in jail. . . ." 320 S.E.2d at 450. While the state court characterized the proffer made by Stewart's trial counsel as "inartfully worded," and asserted that counsel "should have made clear the testimony of the stockade and jail officers would involve appellant's past behavior in prison," it nevertheless found the trial court's exclusion of the proffered testimony to constitute reversible error. *Id.* Compared to the proffer found to be adequate in *Stewart*, the proffer here was a model of clarity.[5] Thus respondent's suggestion that the South Carolina

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[4] That the prosecutor apparently saw no need to object to these comments by petitioner and his ex-wife is understandable, since the jury was likely to have discounted them as self-serving or biased.

[5] In *Stewart*, defense counsel proffered the testimony of a psychiatrist and a psychologist who were prepared to testify "that the defendant is a person who could be rehabilitated to life in prison." He added that "along the same lines" he also wished to call as witnesses several jail and stockade officers, but included no further explanation of their anticipated testimony. *State* v. *Stewart*, *supra*, Transcript of Record at 1089. The South Carolina Supreme Court reversed the death sentence solely because of the exclusion of the jailers' testimony which had been thus proffered at trial.

courts rejected petitioner's *Lockett* claim only because they understood him to have been seeking the introduction of incompetent lay opinion testimony is simply untenable.

2. The South Carolina Rule Applied At Petitioner's Trial Excludes Every Form Of Evidence Offered To Show Future Good Conduct In Prison.

Respondent pursues its claim that no competent evidence was excluded in this case by asserting that South Carolina law permits competent evidence of a capital defendant's likely future good conduct in prison, while excluding only incompetent lay opinion evidence. Brief of Repondent at 27. This assertion is false. In *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (*Koon I*), the case which the trial judge quoted and applied in excluding petitioner's jail witnesses, the defendant had sought to introduce a prediction of future good conduct in prison from an eminently qualified psychiatrist who had examined the defendant prior to trial. No suggestion was made at trial or on appeal in *Koon I* that the witness was unqualified to offer such a prediction: the South Carolina Supreme Court held simply "that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant." *Koon I*, *supra*, 298 S.E.2d at 773-774.[6]

There is no doubt that the South Carolina Supreme Court's holding in *Koon I* provided the rationale under which petitioner's jail witnesses were barred from testifying in this case. The trial judge, the Honorable Marion H. Kinon, was also the trial judge in *Koon I*. At the time of petitioner's trial, *Koon I* was the only decision of the South Carolina Supreme Court dealing with the admissibility of competent evidence of a capital defendant's likely good behavior in prison, and Judge Kinon cited and quoted from *Koon I* in excluding petitioner's jail

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[6] The psychiatric testimony excluded in *Koon I* is set forth verbatim in *Patterson* v. *South Carolina*, 105 S.Ct. 2056, 2058 n.3 (1985) (Marshall, J., dissenting from denial of certiorari).

witnesses.[7] Thus the record makes quite clear that the trial judge understood and applied *Koon I* as prohibiting, on grounds of relevance, any sort of evidence of petitioner's likely future good conduct in prison. The same is true of the South Carolina Supreme Court, which cited *Koon I* as authority for its conclusion that "[t]he trial judge properly refused to admit evidence of Appellant's *future* adaptability to prison life." J.A. 21 (emphasis in original). In sum, it is plain that *Koon I* was concerned only with the relevance of the issue of a capital defendant's likely future good behavior in prison, no matter how that likely future behavior was sought to be proved, and that this decision was applied in petitioner's case both at his trial and on appeal.

Nor do any subsequent South Carolina decisions correct the unconstitutionally narow view of relevance espoused in *Koon I*. In *State* v. *Koon*, 285 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985) (*Koon II*), the state court again approved the exclusion of expert psychiatric testimony concerning a capital defendant's future adaptability to confinement, and reasserted its view first expressed in *Koon I* that "future adaptability to prison [is] irrelevant because it does not bear on a defendant's character, prior record, or the circumstances of his offense." 328 S.E.2d at 626. *Accord*, *State* v. *Chaffee*, 285 S.C. 21, 328 S.E.2d 464, 471 (1984), *cert. denied*, 105 S.Ct. 1878 (1985). In the face of these cases, respondent's representation to this Court that South Carolina law actually

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[7] Since petitioner's trial, moreover, Judge Kinon has continued to exclude expert predictions of future good behavior in confinement. In *State* v. *Raymond Patterson*, No, 85-GS-32-525, Transcript of Record at 917-918, 958, Court's Exhibit No. 1 (Lexington County Ct. of Gen. Sess., Sept. 3-7, 1985) (appeal filed S.C. Sup. Ct. Sept. 12, 1985), Judge Kinon refused to permit a capital sentencing jury to consider testimony by a highly experienced forensic psychologist who had evaluated the defendant and who was prepared to testify on the basis of that evaluation that the defendant "would be expected to have generally good relations with the authorities in the prison [if given life sentence] and to typically be seen as friendly and adaptable with relatively few conflicts." *State* v. *Raymond Patterson*, *supra*, Court's Exhibit No. 1 (psychological report of Dr. Diane R. Follingstad).

permits competent evidence bearing on the likely future good conduct of a capital defendant in prison is incomprehensible. Petitioner's witnesses were not permitted to testify solely because South Carolina law does not acknowledge the relevance of a capital defendant's likely good behavior in confinement, and for no other reason.

3. Even If Petitioner's Jail Witnesses Had Been Barred On Grounds Of Competence Rather Than Relevance, Such A Holding Would Have Violated *Lockett*.

Neither the record nor South Carolina law support respondent's suggestion that petitioner's mitigation witnesses were excluded only because they were offered to express lay opinions concerning his likely future behavior. But even if respondent was correct, the informed opinions of the jailers who had supervised petitioner for most of the seven-and-a-half months immediately preceding his trial concerning his likely future good conduct in confinement were undeniably relevant and admissible under *Lockett*.

This is so because such predictions by experienced correctional personnel, based on prolonged contact with and observation of petitioner in a correctional environment, would have constituted highly reliable evidence bearing directly on the crucial question of whether society could safely allow petitioner to live in prison. Whether such testimony is characterized as opinion testimony by lay witnesses, Fed. R. Evid. 701, or as the opinion of witnesses "qualified as . . . expert[s] by knowledge . . . [and] experience," Fed. R. Evid. 702, the firsthand observations and experience of such witnesses obviously place them in a position to assist the jury in answering the difficult task of assessing petitioner's likely future behavior in an environment with which the jailers are familiar and the jurors are not. Because "the realities of running a corrections institution are complex and difficult," *Rell* v. *Wolfish*, 441 U.S. 520, 547 n.29, (1979), the Court has often had occasion to acknowledge and defer to the "professional expertise" and "expert judgment" of correctional officials. *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). It is the daily business of jailers and prison officials to make reliable and accurate assessments of the prob-

able future behavior of individual inmates. Such day-to-day experience in the discharge of "one of the most vexing of all state responsibilities," *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring), unquestionably leaves jailers and prison officials better able than lay jurors to predict which inmates are likely to pose risks to institutional security and to other inmates and staff, and which are likely to become well-adjusted and cooperative during their confinement. Given the importance of such considerations to the jury's ultimate sentencing determination, it follows that mitigating evidence of this type cannot, consistent with *Lockett*, be withheld from the jury.

This argument in no way conflicts with South Carolina evidence law. Even if, as respondent insists, the opinions of petitioner's jailers are to be characterized as "lay" opinion testimony, South Carolina law excludes opinions and conclusions of laymen "only when they are superfluous in the sense that they will be of no value to the jury." *State* v. *McClinton*, 265 S.C. 171, 217 S.E.2d 584, 586 (1975); Dreher, *Evidence Law in South Carolina* 16-18 (Thames ed. 1979). Thus there can be little doubt that were South Carolina to acknowledge the relevance of the subject of a capital defendant's future behavior in confinement as a sentencing consideration, opinion testimony from jailers who have had direct custody and control of the defendant for a prolonged period of time would be freely admissible as a matter of state evidentiary law. *Accord*, Fed. R. Evid. 701; McCormick, *Evidence* 26-29 (3d ed. 1984).

In making this argument, petitioner does not disagree with the very general views expressed by the *amici curiae* brief. Just as *Lockett* does not require the sentencer to consider evidence which is irrelevant to the record and character of the individual defendant or the circumstances of the particular crime, so neither does it require the admission of incompetent and unreliable evidence. *See* Brief of Amici Curiae Alabama *et al.* at 6-7. The *amici* brief is primarily of interest in this regard for its failure to cite even a single case in which any state or federal court has construed *Lockett* to require the admission of unreliable and otherwise incompetent evidence. The *amici* do

point to the records of several Texas trials, each conducted nearly a decade ago, in which capital defendants made unsuccesful attempts to inject certain arguably extraneous matters into the sentencing juries' deliberations. Brief of Amici Curiae Alabama *et al.* at 3-4, nn.2-5. The fact that this evidence was excluded, and the exclusions apparently upheld on appeal, can scarcely be said to support the amici briefs pessimistic view of the present administration of the *Lockett* rule in the state courts. On the contrary, the paucity of evidence offered in support of the amici's request for an advisory opinion from this Court on the proper scope of *Lockett* strongly suggests that *Lockett*'s bright-line rule has served its intended purpose well.[8]

CONCLUSION

For the foregoing reasons, and for those set forth in his opening brief, petitioner submits that his sentence of death should be reversed.

Respectfully submitted,

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[8] Equally indifferent to the facts of this case and to the question presented by the ruling actually made below, the *amici* brief restates the issue as whether a state may make and enforce reasonable judgments concerning the reliability of evidence in capital sentencing proceedings. *Id.* at 9, n.8; 9-10. In fact, South Carolina has never made any judgment that either lay or expert predictions concerning capital defendants' future behavior in prison are unreliable. Indeed, the prosecutor in this case urged the jury to make just such a prediction when he argued that petitioner would probably rape other prison inmates if he was given a life sentence. *See* Brief for Petitioner at 25-28. In their briefs, however, the *amici* and the respondent have neither justified nor even acknowledged the misleading and one-sided manner in which petitioner's jury was forced to consider the crucial question of his likely future behavior in confinement.